

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

3-2-77
Affidavit
77-6016

To be argued by
THOMAS H. BELOTE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-6016

BRISTOL-MYERS COMPANY,
Plaintiff-Appellant,

—v.—

FEDERAL TRADE COMMISSION, et al,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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Issues Presented

1. Whether the District Court erred in dismissing Bristol-Myers' action for failure to exhaust its administrative remedies.
2. Whether, if this Court should proceed to the merits, Bristol-Myers' complaint fails to state a claim on which relief can be granted.

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Docket No. 77-6016

BRISTOL-MYERS COMPANY,
Plaintiff-Appellant,
—v.—

FEDERAL TRADE COMMISSION, et al,
Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

This action was commenced on June 9, 1976 seeking judicial review of an interlocutory discovery order entered in a proceeding against plaintiff Bristol-Myers before the defendant Federal Trade Commission ("Commission"). The complaint contains a series of allegations which, in summary, assert that the Commission, through its attorneys ("complaint counsel"), had improperly used its influence to dissuade its prospective witnesses in the Bristol-Myers proceedings from granting *ex parte* interviews to Bristol-Myers counsel, thereby denying Bristol-Myers a fair administrative hearing (8-11a).^{*} Based on these allegations, Bristol-Myers requested the District Court

^{*} Page references in this brief followed by the letter "...a" refer to the Joint Appendix filed with this Court.

to order the Commission to permit Bristol-Myers to: (i) depose complaint counsel and all other Commission personnel whose testimony [*inter alia*] could reasonably be expected to lead to evidence relevant to its suspicions of impropriety, (ii) produce all documentary and physical material which [*inter alia*] could reasonably be expected to lead to evidence relevant "to such suspicions," and (iii) depose the Commission's proposed expert witnesses concerning its suspicions while reserving to Bristol-Myers the right to depose these witnesses again with respect to the substantive issues raised in the administrative proceeding. Bristol-Myers also requested the District Court to enjoin the Commission from continuing the administrative proceeding until discovery had been completed under its first request (10-11a).

On August 20, 1976 the Commission moved for an order dismissing the complaint pursuant to Rules 12(b) (1) and 12(b) (6) of the Federal Rules of Civil Procedure on the grounds that the District Court lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted (12a). In an opinion dated December 30, 1976, the Honorable Charles C. Metzner, United States District Judge for the Southern District of New York, granted the Commission's motion (2-5a). In his opinion Judge Metzner reviewed the factual allegations made by Bristol-Myers in its complaint as well as the administrative law judge's disposition of these contentions and noted that "[i]n this instance the administrative law judge permitted [complaint] counsel to be present if the expert witness so requested. The evidence of any improper influence that in effect denied . . . [Bristol-Myers] the effective assistance of counsel is little more than mere suspicion." (5a). Consequently, Judge Metzner found that Bristol-Myers had "failed to persuade . . . [the] court that judicial intervention would be appropriate here" and dismissed the action on the grounds that it had been "asserted prematurely" before Bristol-Myers had exhausted its administrative remedies (4a).

On January 6, 1977 a judgment was filed which embodied Judge Metzner's written decision and dismissed the action (1a). Bristol-Myers filed its notice of appeal from Judge Metzner's decision on January 12, 1977 (ia).

Statement of Facts

On February 23, 1973 the Commission issued an administrative complaint charging defendant Bristol-Myers Company with *inter alia* misleading and unfair advertising with respect to certain of its products (Bufferin, Excedrin and Excedrin PM), in violation of Sections 5 and 12 of the Federal Trade Commission Act (the "Act"), 15 U.S.C. §§ 45 and 52. During a prehearing conference on this matter held on March 3, 1976, Administrative Law Judge Montgomery K. Hyun ("ALJ") ruled that proposed lay and expert witnesses for the Commission were entitled, if they so desired, to have counsel of their choice present at any interview conducted by counsel for Bristol-Myers, and that complaint counsel had the ALJ's permission to communicate that ruling to the Commission's proposed witnesses (39-40a).

Inasmuch as the ALJ's ruling was four square with the position forwarded by Bristol-Myers at the commencement of the conference, one would normally assume that Judge Hyun's ruling and guidelines had resolved the issue to Bristol-Myers' satisfaction.* However, by

* See transcript of March 3, 1976 proceeding where Bristol-Myers' counsel stated (36a):

... Complaint Counsel evidently feel, and assert, that there is something wrong in the efforts we have been making to have their witnesses grant us interviews without Complaint Counsel being present.

I submit, Your Honor, there is absolutely nothing wrong with that. I think we are perfectly within our rights

[Footnote continued on following page]

application filed March 15, 1976 Bristol-Myers sought to have the ALJ issue subpoenas requiring complaint counsel to produce documents and give testimony relating to their contacts with the Commission's proposed expert witnesses (116-124a)*. On March 23, 1976 the ALJ issued an order denying Bristol-Myers' application for subpoenas, noting that it was "in effect an attempt to conduct an on-the-record inquisition to determine whether any of the complaint counsel has improperly influenced any of the witnesses by his or her contacts and communications with a prospective witness" to deny Bristol-Myers' request for an *ex parte* interview (46-47a). In contrast to Bristol-Myers' allegation that a serious question existed as to whether any of complaint counsel's communications may have altered the witnesses' willingness to grant *ex parte* interviews, the ALJ observed that Bristol-Myers had shown "no justification other than mere suspicion" that some witnesses may have been influenced by complaint counsel in a manner inconsistent with the guidelines set forth at the March 3, 1976, pre-hearing conference (47a).* The ALJ ruled, however, that Bristol-Myers

will be free to ascertain from the individual witnesses at the interviews the information they now seek through subpoenas and move for appropriate relief should any case of improper influence come to light. (Id.)

in asking for that favor, even though it is their witnesses and beyond that I am sure it is nothing that they cannot protect themselves on and probably already have, by notifying or telling these witnesses that they need not meet with us without Complaint Counsel or some other of the Federal Trade Commission representative being present.

* On March 22, 1976 complaint counsel responded requesting that the application be rejected in toto (126-132a).

** The ALJ also found that Bristol-Myers had "utterly failed to justify the need for subpoenas for such an inquisition at this time" (Id.).

Subsequently, Bristol-Myers moved for reconsideration of the order dated March 23, 1976 and it further applied for permission to conduct *ex parte* interviews of the proposed witnesses to gather evidence of complaint counsel's alleged improper conduct in addition to later substantive interviews of these same witnesses (135-140a). In response to the ALJ's finding that it had failed to substantiate its suspicion of improper conduct Bristol-Myers seized upon portions of statements by complaint counsel, asserting a right to be present when Bristol-Myers interviewed Commission witnesses, during the March 3, 1976 prehearing conference (38a), and argued that it "necessarily follow[ed]" that complaint counsel improperly instructed the Commission's witnesses not to submit to interviews unless complaint counsel was present (138a). Bristol-Myers also argued that it had evidence that complaint counsel exceeded the March 3rd guidelines but refused to produce this evidence, other than *in camera* to the ALJ, since it asserted it was entitled to maintain it for cross-examination purposes (139a).

By order dated April 5, 1976 the ALJ denied Bristol-Myers' motion noting that it had failed to raise any new questions or arguments not previously considered in the order of March 23, 1976. The ALJ found that Bristol-Myers had "merely reiterate[d] their suspicion" of improper influence and further ruled that the request for *ex parte* interviews on the subject of complaint counsel's conduct would unnecessarily subject the expert witnesses to repeated interviews which would "needlessly prolong the pre-trial proceedings". (49-50a).*

* On April 9, 1976 complaint counsel responded to the motion for reconsideration and also moved to strike certain references to alleged evidence of misconduct which Bristol-Myers refused to produce (146-158a). In their response and motion complaint

[Footnote continued on following page]

On April 15, 1976 Bristol-Myers applied to the ALJ for an order, pursuant to Section 3.23(b) of the Commission's Rules of Practice, 8 C.F.R. § 3.23(b), permitting an interlocutory appeal from the orders of March 23 and April 5, 1976 (166-176a). Complaint counsel responded noting that 8 C.F.R. § 3.23(b) permits interlocutory appeals only when the ruling being challenged "involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of litigation or subsequent review will be an inadequate remedy" (178a). Inasmuch as the ruling which was being challenged involved only a discovery request which would not be disturbed by the Commission absent a clear abuse of discretion, and since the appeal did not otherwise meet the requirements of § 3.23(b), complaint counsel urged that the request be denied (178-180a). In denying this application the ALJ noted that Bristol-Myers' offer to disclose *in camera* to the ALJ certain evidence which would have allegedly substantiated its suspicion of impropriety by complaint counsel was of no consequence; if Bristol-

counsel stated that they had sent letters to the Commission's proposed witnesses informing them of the ALJ's ruling of March 3, 1976 that Commission counsel could be present at interviews conducted by Bristol-Myers counsel if the witness wished (40a). As to Bristol-Myers' excuse for not producing this alleged evidence of complaint counsel's misconduct, complaint counsel noted that any such material, if it existed, would have no bearing on the substantive issue of the administrative complaint and questioned its alleged value for cross-examination of a witness (148a, 157a). Complaint counsel also objected to the Bristol-Myers' tactic of forcing the Commission's proposed witnesses to undergo multiple unwarranted interviews and submitted to the ALJ documentation evidencing Bristol-Myers' attempt to use this position concerning *ex parte* interviews to delay the administrative proceedings (149a, 150-153a).

Myers had such "evidence", the ALJ ruled, it was incumbent on Bristol-Myers to submit it to the ALJ for consideration in conjunction with its motion (52a). In ruling that Bristol-Myers had failed to satisfy the requirements set forth in 8 C.F.R. § 3.2(b) the ALJ also stated:

it is my intention to accord respondent all due process consistent with the requirements of an expeditious hearing. In my view, the procedure outlined in my March 23, 1976 order is adequate to safeguard respondent's due process rights with respect to pretrial discovery regarding anticipated testimony of complaint counsel's expert witnesses, including respondent's right to interview complaint counsel's prospective expert witnesses. As pointed out at the March 3, 1976 prehearing conference, under the Commission's Rules of Practice, complaint counsel would have a right to be present at any deposition of any of their witnesses being taken by Bristol-Myers, a rule in accord with federal court practice. In these circumstances, to expend valuable trial preparation time in collateral proceedings of this type in the name of due process would be carrying a good thing too far and is unwarranted (53a).

By petition dated May 3, 1976, Bristol-Myers sought discretionary review by the Commission of the three orders issued by the ALJ dated March 23, April 5, and April 20, 1976. Noting the broad discretion granted to an administrative law judge in controlling conduct of adjudicative proceedings, the Commission found that there had been no showing by Bristol-Myers of a clear abuse of discretion and therefore denied the petition (55-56a). Thereafter, on June 9, 1976 Bristol-Myers commenced this action in the United States District Court for the Southern District of New York seeking the relief previously denied by the ALJ and the Commission.

ARGUMENT

The District Court Correctly Found That Judicial Intervention In This Administrative Action Was Inappropriate And Properly Dismissed The Action On The Grounds That It Had Been Asserted Prematurely Before Bristol-Myers Had Exhausted Its Administrative Remedies.

As we argued in the District Court below, the present action is only another attempt by Bristol-Myers to delay and disrupt the orderly administrative investigation and adjudication of the Commission's charges of misleading and unfair advertising against this company. This Court noted in a previous proceeding in which Bristol-Myers sought judicial review of similar interlocutory discovery matters arising out of the same administrative complaint:

Finally, we have the impression that the company has not been unaware of the benefits of the delay in the administrative proceeding caused by the action in the district court and by this appeal. At oral argument, one member of the panel felt sufficiently positive about the company's intent to delay to raise the appropriateness of taxing double costs on appeal. Fed. R. App. P. 38. Our failure to do so should not be taken as an encouragement to further attempts to prolong the administrative proceedings through efforts to obtain premature judicial review. The mandate shall issue forthwith.

Bristol-Myers Company v. F.T.C., 469 F.2d 1116, 1119 (2d Cir. 1972); cf. *Aceredo v. Immigration and Naturalization Service*, 538 F.2d 918 (2d Cir. 1976) (discussing F. R. App. P. 38 as an appropriate means of controlling litigation pursued as a means of delaying administrative action).

Apparently, both this Court's statement with respect to exhaustion, and its warning concerning attempts to prolong the administrative proceedings by premature requests for judicial review, have fallen on deaf ears.

Just as Bristol-Myers previously failed to persuade this Court "that judicial intervention would here be appropriate" so also, with its present unsubstantiated allegations of alleged impropriety, did Bristol-Myers fail to persuade the District Court in its new attempt to frustrate the administrative process. We respectfully submit that Judge Metzner's finding that Bristol-Myers' claims were "asserted prematurely" (4a) and that this action should be dismissed for failure to exhaust administrative remedies should be affirmed by this Court. Alternatively, should this Court decide to reach the merits * we submit that the complaint fails to state a claim upon which relief can be granted since the rulings of the administrative law judge were proper and well within the bounds of his broad discretion to control the conduct of the administrative proceedings.

A. Bristol-Myers Failed To Exhaust Its Administrative Remedies

The district court determined that if the formal adjudicative proceedings below subsequently result in a cease and desist order it is clear that Bristol-Myers would have the opportunity to press its claims for unusual discovery demands on review by a Court of Appeals (4a). Judge Metzner was absolutely correct. Both the Act and the Administrative Procedures Act (the "APA") make it clear that the issue raised by Bristol-Myers in the present

* Compare *Bristol-Myers Company v. F.T.C.*, *supra* at 1119-1120 (Manfield, J., concurring).

action lies within the *exclusive* jurisdiction of the Court of Appeals and can be reviewed only after a final order, if any, is entered against Bristol-Myers at the conclusion of the administrative proceedings. Section 5(c) and (d) of the Act, 15 U.S.C. § 45(c) and (d), provides for judicial review of the Commission's actions and vests "exclusive" jurisdiction to review the Commission's action in the courts of appeals.* Furthermore, section 10(c) of the APA, 5 U.S.C. § 704, provides that "a preliminary, procedural or intermediate agency action or ruling, not directly reviewable, is subject to review on the review of final agency action." ** The district court's decision that Bristol-Myers' challenges to interlocutory discovery orders are properly reviewable (if a cease and desist order is ultimately issued) upon review of that order by the Court of Appeals is mandated by 5 U.S.C. § 704 and 15 U.S.C. § 45(c) and (d) and, that decision is totally consistent

* Section 5(c) and (d) of the Act, 15 U.S.C. § 45(c) and (d), provide for judicial review of the Commission's actions and state in relevant part:

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States . . . by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside.

* * * * *

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

** 5 U.S.C. § 704 provides in full:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. *A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.* (Emphasis added).

with this Circuit's previous decision concerning Bristol-Myers' demand for judicial intervention in preliminary and procedural aspects of this on-going administrative proceedings before the Commission. In affirming the District Court's dismissal of that earlier action this Circuit explicitly stated

We believe that the claim is asserted prematurely and was properly dismissed for failure to exhaust administrative remedies. Judicial review of Federal Trade Commission proceedings is governed by section 45(c) of Title 15, United States Code, which limits the power of review to final cease and desist orders and which makes review available in the courts of appeals. Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, provides:

Agency action made reviewable by statute . . . [is] subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

If formal adjudicative procedures subsequently result in a cease and desist order directed against Bristol-Myers, it seems clear that on review by this or any other court of appeals the company will have an opportunity to press the claim that it was entitled by statute to subpoenas during the informal negotiating process. See *Frito-Lay, Inc. v. FTC*, 380 F.2d 8 (5th Cir. 1967); cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49-50, 58 S.Ct. 459, 82 L.Ed. 638 (1938).

Bristol-Myers Company v. F.T.C., *supra* at 1117-18 (footnote omitted). See *Renegotiations Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974); *Sterling Drug, Inc. v. Weinberger*, 509 F.2d 1236, 1239 (2d Cir. 1975); *Pep-sico, Inc. v. F.T.C.*, 472 F.2d 179, 185-87 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973); *Maremont Corp. v.*

F.T.C., 431 F.2d 124, 128 (7th Cir. 1970) Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (statutory scheme in the food and drug area did not preclude judicial review of a pre-enforcement challenge to formally promulgated regulations and such review did not delay or impede effective enforcement of the statute).

Furthermore, as we noted in our motion to dismiss before the district court, adherence to the exhaustion doctrine is particularly appropriate here where Bristol-Myers is again seeking to have the judiciary intervene in pending administrative proceedings merely to seek review of a procedural discovery ruling. The Fifth Circuit's admonition against the type of piece-meal litigation that Bristol-Myers is so insistent upon pursuing in this matter is instructive:

The plaintiffs are asking that a procedural, 'case-handling' decision be overturned *in media res* to require joinder 'with the concomitant, complication and clutter of the hearing.' L. Jaffe, *Judicial Control of Administrative Action* 444 (1965). If trial courts are insulated from this kind of interference, see 28 U.S.C. § 1292(a), certainly administrative tribunals ought to be and, indeed, they generally have been immune from interlocutory review of procedural rulings. E.g., *Texaco, Inc. v. Federal Power Commission*, 117 U.S. App. D.C. 268, 329 F.2d 223 (D.C. Cir. 1963), cert. denied, 375 U.S. 941, 84 S.Ct. 346, 11 L.Ed. 2d 272 (1964); *Chicago Automobile Trade Association v. Madden*, 328 F.2d 766, 769 (7th Cir.), cert. denied, 377 U.S. 979, 84 S.Ct. 1885, 12 L.Ed. 2d 747 (1964).

Coca Cola Company v. F.T.C., 475 F.2d 299, 304 (5th Cir.), cert. denied, 414 U.S. 877 (1973).

Bristol-Myers' naked allegations (9a) that the administrative rulings will "irrevocably" deprive it of a fair hearing or result in an expensive and lengthy administrative hearing were properly rejected by the district court

in its finding that Bristol-Myers' speculation did not rise to the level of irreparable injury which would justify intervention in this preliminary agency action (JA 4). See, e.g., *Renegotiation Board v. Bannercrest Clothing*, *supra*, 469 F.2d at 1118; *Small v. Kiley*, Docket No. 76-6162, slip op. at 2225 (2d Cir. decided March 9, 1977).

Although a narrow exception to the general rule against judicial consideration of interlocutory agency rulings exists in certain cases upon the assertion of a colorable constitutional right, see *Coca Cola Company v. F.T.C.*, 475 F.2d 299, 303 (5th Cir. 1973), that exception has no application to the instant case. Unlike the circumstances underlying *International Business Machines v. Edelstein*, 526 F.2d 37 (2d Cir. 1975), the administrative rulings below are in complete accord with the principle that counsel may conduct an *ex parte* interview of an adverse witness, if the witness so desires, without the presence of opposing counsel. Furthermore, Bristol-Myers has presented no evidence substantiating its allegation that complaint counsel interfered with its alleged efforts to conduct such interviews with the Commission's proposed witnesses and has failed to take advantage of the ALJ's ruling permitting it to seek such evidence. Therefore its 415 U.S. at 24; *Bristol-Myers Company v. F.T.C.*, *supra*, (D.C. Cir. 1966) where the record showed a prosecutor had advised witnesses not to talk to anyone unless he was present, is also unwarranted.*

* Bristol-Myers argues that in view of complaint counsel's argument at the prehearing conference on March 3, 1976 it necessarily follows that a violation in the nature of that demonstrated in *International Business Machines* and *Gregory* must exist. First, Bristol-Myers' out of context quotations from the transcript of that hearing ignore the fact that the Commission's proposed witnesses had already contacted complaint counsel after receiving Bristol-Myers' request for an interview and noted their desire to have complaint counsel present at any such interviews (42-43a). Second, Bristol-Myers' argument ignores the

[Footnote continued on following page]

Merely because Bristol-Myers has couched its attack here by raising the spector of a constitutional violation, those suspicions or unsubstantiated allegations, do not warrant judicial intervention in the underlying administrative proceedings. The fact remains that the sole issue in this case is a *factual* determination which should be dealt with in the first instance, on the administrative level. The administrative rulings below clearly enable Bristol-Myers to pursue its allegations. Therefore, despite Bristol-Myers' attempt to categorize this action as one involving an issue of constitutional violation, the ALJ's rulings did not deprive Bristol-Myers of any such rights and judicial intervention remains inappropriate. *Sperry and Hutchinson Company v. F.T.C.*, 256 F. Supp. 136, 143 (S.D.N.Y. 1966). See, e.g., *Barnes v. Chatterton*,

fact that complaint counsel notified the Commission's proposed witnesses of the ALJ's ruling of March 3, 1976 (147a). Any potential misapprehension on the part of the witnesses in respect to their rights, or those of Bristol-Myers was thereby cured. Third, although Bristol-Myers complains that some of its interview requests sent prior to the March 3rd order were not answered by some of the proposed witnesses, Bristol-Myers has conspicuously failed to submit evidence concerning any attempt by them to obtain *ex parte* interviews after the proposed witnesses had been advised of the ALJ's March 3rd ruling. Finally, Bristol-Myers' reliance on the "Menguy letter" (164a) does not support its allegation that substantial evidence has been produced to substantiate its suspicions in this case. We note that the letter from Dr. Menguy was dated March 5, 1976, only two days after the ALJ's initial ruling, and refers to Bristol-Myers' February 11th request for an interview. It cannot be determined from this letter if Dr. Menguy was one of the proposed witnesses who requested the presence of complaint counsel at these interviews. It also seems apparent from the date of the letter that Dr. Menguy had not yet been advised of the ALJ's March 3rd ruling (164a). Nonetheless, these factual issues can be readily resolved if Bristol-Myers goes forward with the administrative proceedings and interviews in accordance with the provisions of Judge Metzner's decision.

515 F.2d 916 (3d Cir. 1975); *Sterling Drug Inc. v. F.T.C.* (D.C. Cir. 1971), 450 F.2d 698; *Maremont Corp. v. F.T.C.*, 431 F.2d 124, 127-28 (7th Cir. 1970). Assuming Bristol-Myers avails itself of the discovery rights accorded to it in the ALJ's ruling and subsequently obtains evidence supporting its suspicion of chicanery by complaint counsel, appropriate relief is available from the ALJ and Bristol-Myers must seek it there.

With respect to Bristol-Myers' argument below that the ALJ's rulings will subject it to lengthy administrative hearings, we noted below that this expense or inconvenience without more does not constitute irreparable injury. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 (1938); *Small v. Kiley*, Docket No. 76-6162, slip op. at 225 (2d Cir. March 9, 1977); *Niagara Mohawk Power Corp. v. F.P.C.*, 538 F.2d 966, 970 (2d Cir. 1976).*

Finally, Bristol-Myers' disregard of the content of the ALJ's rulings is undoubtedly the most persuasive reason for this Court to affirm Judge Metzner's decision that Bristol-Myers' action is premature and that it had failed to exhaust its administrative remedies. The administrative rulings make it clear that the discovery orders are subject to modification should it appear necessary as a result of information developed during pre-hearing discovery. Corrective action by the ALJ would render the issue here moot. See *Maremont Corp. v. F.T.C.*, 431 F.2d at 126-128. Cf. *Abbott v. Gardner*, *supra* at 152-54 (impact of promulgated regulation created a direct and immediate injury in that regulated manufac-

* Bristol-Myers appears to have recast this argument in their brief on appeal. While not specifically arguing that the time and expense of administrative proceedings are cause for judicial intervention, Bristol-Myers suggests that it would be prejudiced on review of a final cease and desist order in the Court of Appeals because "inhibitory influences" upon the Court might dissuade it from overturning an order at that late a date. Suffice it to say that we do not share Bristol-Myers' doubt that it would receive fair treatment on review or that a court of appeals could not formulate an appropriate remedy.

turers risked serious criminal and civil penalties for their failure to immediately comply with the new regulation).

In his order dated March 23, 1976, the ALJ stated that Bristol-Myers

will be free to ascertain from individual witnesses at the interviews the information they now seek through subpoenas, *and to move for appropriate relief should any case of improper influence come to light.* (Emphasis added) (47a).

In his order of April 20, 1976, the ALJ reaffirmed that position, and indeed, expressed awareness of questions regarding due process:

It is my intention to accord respondent all due process consistent with the requirements of an expeditious hearing. In my view, the procedure outlined in my March 23, 1976 order is adequate to safeguard respondent's due process rights with respect to pretrial discovery regarding anticipated testimony of complaint counsel's expert witnesses, including respondent's right to interview complaint counsel's prospective expert witnesses. . . . In these circumstances, to expend valuable trial preparation time in collateral proceedings of this type in the name of due process would be carrying a good thing too far and is unwarranted. (53a).

Nonetheless, Bristol-Myers, continually referring to what "may" have occurred, refuses even to engage in prehearing interviews of the witnesses. (152-153a). As the district court properly noted "[i]t should be quite easy at the beginning of each interview for plaintiff, by appropriate questioning, to ascertain the facts and make a record for action by the administrative law judge". (5a). Bristol-Myers purposeful refusal to exhaust these administrative avenues is nothing more than another attempt to delay and prolong the administrative proceedings and does not form the basis for judicial intervention.

If Bristol-Myers' suspicion is weighed against recognized governmental interests requiring exhaustion of administrative remedies, it is evident that the complaint was properly dismissed by the district court below. K. C. Davis, *Administrative Law of the Seventies* (Supplementing Administrative Law Treatise) § 20.01, p. 449 (1976). Quite clearly the Commission should have the opportunity to make a factual record and exercise its discretion and expertise without the threat of litigious interruption. As noted *supra*, this is Bristol-Myers' second foray into judicial proceedings merely on preliminary administrative rulings. It is also in the public interest to discourage frequent and deliberate flouting of the administrative process, and this is particularly so in a case such as this where administrative delay inures solely to the benefit of a company charged with unfair advertising practices which have gone uncorrected. See *Bristol Myers v. F.T.C.*, *supra* at 1119. Finally, the Commission has an obvious interest in correcting its own mistakes and thereby obviating unnecessary judicial proceedings. The open ended rulings of the ALJ below continue to provide for corrective action should Bristol-Myers substantiate its allegations at a later time. In light of this record it is clear that the district court did not abuse its discretion in requiring exhaustion. *Douglas v. Hampton*, 512 F.2d 976, 988 (D.C. Cir. 1975); *Ludlum v. Resor*, 507 F.2d 338, 400 (1st Cir. 1974).

B. Bristol-Myers Is Not Entitled To The Requested Relief

Assuming *arguendo* that this Court chooses to reach the merits in this case it is nonetheless clear that this action would have to be dismissed for failure to state a cause of action upon which relief may be granted. Cf. *Bristol-Myers Company v. F.T.C.*, *supra* at 1119. In

the face of unsubstantiated charges, both the administrative law judge and the district court found that Bristol-Myers' allegations were based on mere "suspicion". Naked allegations are quite easily made. Yet to date, Bristol-Myers has come forward with nothing, and further continues to impede the progress of the administrative proceedings. (146-154a).

The administrative law judge ruled that the party calling an expert witness may be present when opposing counsel interviews that witness—if the witness so desires, and further that counsel may communicate his ruling to the witnesses.* It cannot seriously be asserted that the administrative law judge's decision that complaint counsel, as well as Bristol-Myers' counsel, was entitled to communicate that ruling to their prospective witnesses was incorrect. See, e.g., *United States v. Matlock*, 491 F.2d 504, 506 (6th Cir.), cert. denied, 419 U.S. 864 (1974); *United States v. White*, 454 F.2d 435, 439 (9th Cir. 1972); *Corbett v. Patterson*, 272 F. Supp. 602, 610 (D. Col. 1967) (Advising a witness of his right not to submit to an interview does not deny the defendant a fair trial.) Furthermore, Bristol-Myers acknowledged the propriety of this rule at the prehearing conference on March 3, 1976 (36a). Clearly, the rulings by the ALJ are reasonable and well within the bounds of "the quasi-judicial discretion" with which an administrative agency is vested in such discovery matters. *Independent Directory Corp. v. F.T.C.*, 188 F.2d 468, 471 (2d Cir. 1951); *E.B. Miller & Co. v. F.T.C.*, 142 F.2d 511, 519-20 (6th Cir. 1944). See *K. Davis, Administrative Law Treatise*, § 8.15, p. 586 n.12 (1958).

* Complaint counsel in their answer to Bristol-Myers' motion for reconsideration stated the content and manner in which it informed the proposed witnesses of the ALJ's ruling (146-147a).

Bristol-Myers' reliance upon *International Business Machine v. Edelstein*, 526 F.2d 37 (2d Cir. 1975) ("*IBM*"), as the district court correctly noted below, is misplaced. In *IBM* the district court had ruled that:

"... if any one of you seeks to interview a witness in the absence of opposite counsel, that you do it with a stenographer present and so that it can be available to the Court for the Court to see it, and I think that is the kind of condition that I would ask you to live upon to." 526 F.2d at 41 (Emphasis in appellate decision)

Thereafter, this Court found that the stated purpose of that order ("so that it can be made available to the Court, for the Court to see it") was objectionable because it was tantamount to a ruling that the trial judge be present at every witness interview and thus be cognizant of each proposed witness statement even though that person might not be called to testify. *Id.* at 41-42. This Court noted that the trial judge had *exceeded* his authority in ordering the transcription of interviews because: (1) it violated the principle that counsel for all parties have the right to interview adverse witnesses without the presence of opposing counsel, and (2) it conflicted with the trial judge's role to pass upon the admissibility of proof, when offered, and to render a decision upon admitted proof.

The decision of the district court in *IBM* was entirely outside the permissible bounds of the trial court's discretion and exceeded the Court's jurisdiction. *Id.* at 40. In contrast, the ALJ's rulings in this case were discretionary orders well within the bounds of his discretion in discovery proceedings and capable of correction, if necessary, on appeal of a final order. *Id.* at 40. In this case the ALJ has ruled in accord with this Court's decision in the *IBM* case (39-40a) adhering to the rule that if a

witness so desires, counsel is entitled to be present at any interview requested by opposing counsel. Furthermore, the various orders of the administrative law judge below (35-53a) conclusively demonstrate that Bristol-Myers has not been "compelled" to undertake witness interviews in the presence of complaint counsel and in violation of the principles iterated in the *IBM* case. (See Plaintiff-Appellant's Brief p. 14)

To the contrary, if anything is clear, the Bristol-Myers' demand that witness interviews be conducted in the absence of complaint counsel, and the accompanying gag order on communications between the proposed witnesses and complaint counsel (140a), are in complete contravention of existing judicial precedent and are totally unwarranted, given Bristol-Myers' assertion that it need not show whether such alleged misconduct by complaint-counsel actually occurred. (Plaintiff-Appellants Brief, p. 19). Even if such a "fishing expedition" did not harass the proposed witnesses or unnecessarily prolong and delay the administrative proceedings, the action sought by Bristol-Myers would infringe upon the witnesses' right to have counsel present, if so desired.

It is quite evident that the administrative law judge has left an open avenue for Bristol-Myers to pursue should evidence constituting more than suspicion or mere speculation be demonstrated during the administrative proceedings. In the meantime Bristol-Myers should not be permitted to delay the proceedings by its refusal to initiate and conclude the prehearing interviews. Certainly Bristol-Myers is not entitled to subject the proposed witnesses to multiple time consuming interviews on the basis of its suspicion and it would be particularly inappropriate for Bristol-Myers to demand that any interview be necessarily conducted outside the presence of complaint counsel if that is contrary to the wishes of potential witnesses.

CONCLUSION

The decision of the District Court should be affirmed.

Dated: New York, New York
March 22, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

CA 77-6016

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the 25th day of March 1977, she served ~~two copies~~ ^{two copies} of the within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

Bruce R. Hafner, Esquire
60 East 42nd Street
New York, New York 10017

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Marian L. Bryant

25th day of March, 19 77

Pauline V. Proa

PAULINE P. THOLA
Notary Public, State of New York
No. 31-4832381
Qualified in New York County
Commission Expires March 30, 1978